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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 557 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? NO.

2. To be referred to the Reporter or not? NO.

3. Whether Their Lordships wish to see the fair copy of the judgement? NO.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO.

5. Whether it is to be circulated to the Civil Judge? NO.

STATE OF GUJARAT

Versus

ARVINDBHAI KARSHANBHAI VANKAR

Appearance:
MR S.R.Divetia, APP for Petitioner
MR PM VYAS and Ms. Mona B. Ravalfor Respondent

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

Date of decision: 11/05/99

ORAL JUDGEMENT (Per Panchal, J)

The acquittal of the respondent of the offence punishable under Section 302 of the Indian Penal Code, recorded by the learned City Sessions Judge, Ahmedabad, vide judgment and order dated January 24, 1994, rendered

in Sessions Case No.43/93, is subject matter of challenge in the present appeal which is filed by the State of Gujarat under Section 378 of the Code of Criminal Procedure, 1973.

2. The prosecution case in brief is as under :
On March 24, 1992, one Himmat Shivaji Thakor and Shankar Raghavbhai Parmar were taking snacks near the milk shop of Ajmerbhai Rabari, situated in Rabari Colony, Odhav. The respondent came at the said place at about 7-30 p.m. and asked Shankar Raghavbhai Parmar to come with him. It is the case of the prosecution that Himmat Shivaji Thakor asked Shankar Raghavbhai Parmar not to accompany the respondent and thereupon an altercation took place between the respondent and Himmat Shivaji Thakor. The prosecution case is that the respondent caused an injury with Rampuri knife on stomach of Himmat Shivaji as a result of which Himmat Shivaji fell down on the ground. The injured was taken to Shardaben Hospital by his brother Vagesing Shivaji. The respondent who had attempted to run away was caught by members of the mob which had collected near the place of the incident and was beaten. The information regarding the incident was given by the Head Constable on duty at Shardaben Hospital to Police Sub Inspector, Odhav Police Station on March 24, 1992 at about 8-30 p.m. When the Investigating Officer Mr. K.F.Gohil was about to leave the police station for the purpose of investigation, Karsanbhai Vankar who is the father of the respondent came to the police station and informed Mr. Gohil that his son was lying unconscious in an injured condition. The respondent was also removed to Shardaben Hospital for treatment. In the Vardhi which was sent to Odhav police station, the name of assailant of Himmat Shivaji Thakor was mentioned to be Shankar Raghavbhai Parmar, but Mr. Gohil made inquiries at the hospital whereupon he learnt that the real assailant was the respondent. Accordingly Mr. Gohil recorded the first information report as narrated by Vajesing i.e. brother of injured Himmat and registered the offence punishable under Section 324 of IPC against the respondent. The Investigating Officer recorded statement of witnesses who were found conversant with the facts of the case and also drew panchnama of place of occurrence on March 25, 1992. The statement of Himmat Shivaji Thakor was also recorded by the Investigating Officer on March 25, 1992. As the respondent was injured and was being treated, he was not immediately arrested and before he could be arrested, he fled from Shardaben Hospital. The injured Himmat Shivaji Thakor expired during the course of treatment on April 17, 1992 at about 13-50 hours. Police Inspector Mr.

Gohil at the relevant time was on leave, ad therefore, investigation was taken over by Police Inspector Mr. Parghi before the deceased succumbed to injury. On expiry of the deceased, necessary report was sent to Odhav Police Station, and therefore, the investigation was taken over by P.I. Mr. R.M.Chaudhry from P.I. Mr. Parghi and offence under Section 302 of IPC was added. The Investigating Officer held inquest on the dead body of Himmat Shivaji and sent the dead body for postmortem examination. The autopsy on the dead body of Himmat Shivaji was performed by Dr. Mishra, Dr. Alpesh Shah and Dr. Deshmukh. The incriminating articles which were seized during investigation were sent to Forensic Science Laboratory for analysis. On receipt of report from the F.S.L. and on completion of investigation, the respondent was charge sheeted for the offences punishable under Section 302 of the Indian Penal Code and Section 135 of the Bombay Police Act. As the offence punishable under Section 302 of the IPC is exclusively triable by Sessions Court, the case was committed to Sessions Court for trial, where it was numbered as Sessions Case No.43/93. The learned City Sessions Judge framed the charge against the respondent for the offence punishable under Section 302 of the Indian Penal Code and Section 135 of the Bombay Police Act. The charge was read over and explained to the respondent who pleaded not guilty to the same and claimed to be tried. Therefore, the prosecution examined (1) Vajesing Shivaji, PW 1, at Exh.18, (2) Dr.Alpesh Amrutlal Shah, PW 2, at Exh.20, (3) Ranchhodbhai Masotbhai Chaudhry, PW 3, at Exh.22, (4) Laljibhai Ajmerbhai Desai, PW 4, at Exh.25 and (5) Karansing Vajesing Gohil, PW 5, at Exh.26, to prove the case against the respondent. The prosecution also produced documentary evidence such as report received from F.S.L. at Exh.11, Vardhi received by Odhav Police Station at Exh.12, panchnama of place of offence at Exh.14, inquest panchnama at Exh.16, complaint filed by Vajesing Shivaji at Exh.18, postmortem note of deceased Himmat Shivaji at Exh.21 etc. in order to bring home guilt to the respondent. After recording of evidence of prosecution witnesses was over, the learned Judge questioned the respondent generally on the case and recorded his statement under Section 313 of the Code. In his further statement, the respondent denied the case of the prosecution. However, no evidence in defence was led by the respondent.

3. On appreciation of evidence led by the prosecution, the learned Judge held that it was proved by the prosecution that the respondent had caused injury to deceased Himmat Shivaji Thakor with knife on March 24,

1992. After taking into consideration the medical evidence on record, the learned Judge deduced that as cause of death was shock as a result of septicemia following peritonitis, the respondent had committed the offence punishable under Section 324 of the Indian Penal Code read with Section 135 of the Bombay Police Act. The learned Judge, therefore, acquitted the respondent of the offence punishable under Section 302 of the Indian Penal Code, but convicted him under Section 324 of the Indian Penal Code read with Section 135 of the Bombay Police Act and sentenced him to undergo R.I. for one year for the offence punishable under Section 324 of IPC and R.I. for one month for the offence punishable under Section 135 of the Bombay Police Act, by the impugned judgment giving rise to the present appeal. It may be stated that sentences of imprisonment were ordered to run concurrently.

4. Mr. S.R.Divetia, learned A.P.P. submitted that deceased died because of the knife injury caused by the respondent, and therefore, the respondent ought to have been convicted of the offence punishable under Section 302 of the IPC. The learned counsel for the appellant pleaded that the deceased had caused injury on vital part of the body of deceased which ultimately resulted into his death, and therefore, acquittal of the respondent of the offence punishable under Section 302 of the IPC should be reversed by the Court. The learned counsel further claimed that Rampuri knife which was used in the commission of offence was not a sterilized weapon and as the infection had developed because of the injury caused by the respondent, he ought to have been convicted under Section 302 of IPC. The learned counsel for the State Government in the alternative contended that the medical evidence on record clearly establishes that the deceased was in severe bodily pain and was unable to follow his ordinary pursuits during the space of twenty days, and therefore, the respondent ought to have been convicted of the offence punishable under Section 326 of the IPC.

5. Mr.P.M.Vyas, learned counsel for the respondent submitted that the evidence on record does not establish that the death of the deceased was the direct result of the injury caused by the respondent, and therefore, well-founded acquittal of the respondent of the offence punishable under Section 302 of the IPC should not be disturbed by the Court in the present appeal. It was claimed that the evidence on record does not establish that septicemia following peritonitis had developed because of the injury caused to the deceased by the respondent, and therefor, the acquittal appeal should not

be accepted. So far as alternative plea raised by learned A.P.P. is concerned, Mr. Vyas, learned counsel for the respondent submitted that the evidence on record does not establish that the deceased was in severe bodily pain or was unable to follow his ordinary pursuits during the space of twenty days, and therefore, he should not be convicted of the offence punishable under Section 326 of the IPC.

6. We have been taken through the entire evidence on record by the learned counsel for the parties and we have heard the learned counsel for the parties at length. The evidence of Vajesing Shivaji, the brother of the deceased, recorded at Exh.18, clearly establishes that when the deceased was being removed to Shardaben Hospital for treatment, the deceased had stated before the witness that injury with knife was caused to him by the respondent. Though the brother of the deceased was cross-examined searchingly by the learned counsel for the respondent, nothing could be brought on record to dislodge the assertion made by the said witness that his brother stated before him that the respondent had caused injury by means of Rampuri knife. This witness is amply corroborated by first information report produced on record of the case at Exh.19, which was lodged by him promptly. The evidence of Laljibhai Ajmerbhai Desai, near whose shop the incident had taken place also proves beyond reasonable doubt that the respondent had caused injury to the deceased by giving knife blow on his stomach. This witness was also cross-examined at length by the learned counsel for the respondent, but nothing was brought on record to demolish his assertion on oath before the Court that the respondent had caused injury to the deceased by means of Rampuri knife. The evidence of abovereferredto two witnesses is amply corroborated by medical evidence on record. Moreover, the incident had taken place on March 24, 1992 and the injured expired on April 17, 1992. His statement was recorded by the Investigating Officer on March 25, 1992, which will have to be treated as his dying declaration in view of the provisions of Section 162 (2) of the Code of Criminal Procedure, 1973. The dying declaration of the deceased which is amply proved by the Investigating Officer also establishes beyond reasonable doubt that the deceased was author of the injury caused to the deceased. Under the circumstances, the finding recorded by the learned Judge that the respondent had caused knife injury to the deceased on March 24, 1992, is eminently just and is hereby upheld.

7. The next question which arises for consideration

of the Court is as to respondent committed which offence. The evidence of Dr. Alpesh Shah, recorded at Exh.20 shows that the cause of death of deceased was shock as a result of septicemia following peritonitis. The medical evidence clearly shows that in the stomach of deceased infection had developed resulting into formation of pus, and therefore, Himmat Shivaji had died. Under the circumstances,it is difficult to hold that the respondent caused death of Himmat shivaji by causing knife injury to him with the intention of causing his death or with the intention of causing such bodily injury as was likely to cause death or with the knowledge that he was likely to cause death of Himmat Shivaji by giving knife blow. It is not established by prosecution that death of the deceased was direct result of the injury caused to him by the respondent.The medical evidence on record does not establish that the bodily injury caused to deceased Himmat Shivaji was sufficient in the ordinary course of nature to cause his death. On the contrary, the evidence of doctor examined establishes that the internal pus formation was likely to cause death of the deceased. On the totality of the facts and circumstances of the case, we are of the opinion that the learned Judge was justified in deducing that the respondent was not guilty of the offence punishable under Section 302 of the IPC.

8. However, the evidence of Dr.Alpesh Amrutlal Shah proves clinchingly that the deceased Himmat Shivaji was admitted in Shardaben Hospital for treatment on March 24, 1992, and had expired on April 17, 1992. Thus, there is no manner of doubt that the deceased was in the hospital and was required to take treatment for a period of more than 20 days. Though the deceased was not killed outright, but infection and pus formation supervened and he died after 24 days. The medical evidence also shows that during the space of 20 days, the deceased was in severe bodily pain and was unable to follow his ordinary pursuits. It is not the case of the respondent that during the space of 20 days when the deceased was in the hospital and was undergoing treatment, he was not in severe bodily pain or was able to follow his ordinary pursuits. On the contrary, the medical papers indicate that extensive treatment was given to the deceased during this period and when infection resulting into pus formation on large scale takes place, it can be reasonably and safely held that the deceased must have been in severe bodily pain. Under the circumstances, we are of the opinion that clause eighthly of Section 320 of the Indian Penal Code would be squarely attracted to the facts of the present case and it will have to be held that the respondent committed offence punishable under

Section 326 of the IPC. The learned Judge was not justified in convicting the respondent of the offence punishable under Section 324 of the IPC in view of the positive medical evidence establishing the commission of the offence punishable under Section 326 of the IPC. We accordingly hold that the respondent is guilty of the offence punishable under Section 326 of the IPC and his conviction recorded by the learned Judge under Section 324 of the IPC is hereby set aside. We may state that the conviction of the respondent under Section 135 of the Bombay Police Act is well founded and is not challenged by the learned counsel for the respondent.

9. We have heard the respondent on the question of sentence. He has stated that he is suffering from T.B. and is unemployed. His wife who is present in the Court had shown willingness to deposit Rs.10,000/- (Rupees Ten Thousand Only) to be paid as compensation to the mother of the deceased. The respondent has prayed that he may not be directed to undergo further imprisonment. We have also heard the learned Addl. Public Prosecutor on the question of sentence. We find that the incident had taken place on a trivial matter. The evidence on record does not show that the respondent had taken undue advantage during the incident. On the contrary, the evidence establishes that before the knife blow was given by the respondent, an altercation as well as scuffle had taken place between the respondent and the deceased. The prosecution has not brought on record any evidence to establish enmity between the respondent and the deceased. The incident had taken place on the spur of the moment. The statement submitted by the learned A.P.P. shows that as an under-trial prisoner, the respondent was imprisoned for a period of 10 months, 22 days. The acquittal appeal filed by the State Government was placed for admission hearing on August 5, 1994 and while admitting the appeal, the Division Bench hearing the appeal had issued bailable warrant in the sum of Rs.5,000/- (Rupees Five Thousand Only) with a surety of the like amount against the respondent. The record of the case further shows that the respondent was taken into judicial custody and sent to Sabarmati Central Prison, Ahmedabad on June 20, 1996 and was released on January 31, 1997, when he was released on bail. Thus, the record of the case shows that during the pendency of the appeal, the respondent was in judicial custody for about 225 days. It means that the respondent has already undergone sentence of 18 months, 5 days. The respondent has shown willingness to pay compensation of Rs.10,000/- (Rupees Ten Thousand Only) to be paid to the mother of the deceased and has deposited the said sum in the Court pursuant to

permission granted by the Court on May 10, 1999. The respondent was acquitted of the offence punishable under Section 302 of the IPC vide a judgment and order dated January 24, 1994, and after his release on bail, nothing adverse is reported against him. The acquittal appeal which was filed in the year 1994 is taken up for final hearing in the year 1999. Moreover, the respondent is suffering from T.B. and is unemployed. Having regard to the abovereferred to circumstances, we are of the opinion that interest of justice would be served if the respondent is sentenced to the period of imprisonment already undergone by him and fined to Rs.10,000/- (Rupees Ten Thousand Only) to be paid to the mother of the deceased by way of compensation to her as contemplated by Section 357 of the Code of Criminal Procedure.

10. Accordingly, we convict the respondent under Section 326 of the Indian Penal Code as well Section 135 of the Bombay Police Act. He is sentenced to the the period already undergone by him, with fine of Rs.10,000/(Rupees Ten Thousand Only). The amount of Rs.10,000/(Rupees Ten Thousand Only) which is deposited by the respondent shall be paid to the mother of the deceased after due varification. The appeal filed by the State Government stands partly allowed. Muddamal be disposed of in terms of the directions given by the learned Judge in the impugned judgment.

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